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The Nationality of Claims Principle of Public International Law and the Helms-Burton Act

Robert L. Muse

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By ROBERT L. MUSE*

I. Introduction

The Cuban Liberty and Democratic Solidarity Act (LIBERTAD) of 1996[1] seeks to collapse the economy of Cuba and thereby force a radical and if necessary an even violent transformation of that country's political and social institutions.[2] Titles III and IV of the Helms-Burton Act are the means to that end. To achieve institutional collapse in Cuba, both Titles III and IV are intended to deter foreign investment in that country by penalizing investors in expropriated Cuban properties–even if those properties were expropriated by the government of Cuba from Cuban citizens.[3] It is this particular feature of the Helms-Burton Act–its violation of the nationality of claims principle of public international law–that is the subject of this Article.

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* District of Columbia Bar; Barrister-at-Law (Middle Temple), Muse & Associates, Washington D.C. Mr. Muse advises clients on aspects of the Helms-Burton Act. The views expressed in this Article are those of the author and do not necessarily reflect the views of the author's firm or its clients. Portions of this Article appear in *The LIBERTAD Act: Implementation and International Law: Hearing Before the Senate Subcomm. on Western Hemisphere and Peace Corps Affairs,* 104th Cong., 2nd Sess. 58-76 (July 30, 1996) (testimony of Robert L. Muse).

1. Pub. L. No. 104-114, 110 Stat. 785 (1996), § 301 *et seq.* (codified at 22 U.S.C. §6021-91 (1997)) [hereinafter "Helms-Burton Act"].

2. Richard Nuccio, President Clinton's former special advisor on Cuba policy has said, "Under the Helms-Burton Act, the basic model of change in Cuba is societal collapse leading to a violent upheaval." *U.S. Policy on Cuba Criticized: Two Former Aides Blame Clinton,* MIAMI HERALD, Apr. 21, 1997, at 8A.

3. As Senator Phil Gramm has explained during debate on Senator Helms's LIBERTAD bill: "The effective result of [this legislation] will be that private investors will think two and three times before they bring their investment money to Castro's Cuba." CONG. REC. 1481 (daily ed. March 5, 1996). An important impetus for the Helms-Burton Act was the perceived vulnerability of the Cuban economy, and, hence, the government of Cuba itself, in the aftermath of the dissolution of Cuba's trading links with the former Eastern Bloc.

Under Title III of the Helms-Burton Act, "traffickers" in "confiscated" properties in Cuba are subject to treble damages liability in U.S. federal courts.[4] Under Title IV, such traffickers are to be denied entry into the United States.[5] Lawsuits may be brought against "traffickers" under Title III (and exclusions of those traffickers from the United States may be sought under Title IV) by "United States nationals" who "own the claims" to properties in Cuba "confiscated" by the government of Cuba on or after January 1, 1959.[6] The Helms-Burton Act defines the term "U.S. national" as "any U.S. citizen,"- that is, anyone who is *at present* a U.S. citizen.[7] It warrants emphasis that the Helms-Burton Act does *not* require that a Title III litigant have been a U.S. citizen at the time of property loss in Cuba. The effect of this provision of the statute is to give naturalized Cuban Americans retroactive rights under U.S. law to properties lost to them in a foreign country *before* they became U.S. citizens.

As will be discussed below, Cuban American claims to "confiscated" properties in Cuba have no basis in international law and were included in the Helms-Burton Act only in order to produce a global moratorium on investment in Cuba. The objective of such a moratorium is, again, the engineered "meltdown" of Cuba's economy.[8] When viewed

4. *See* Helms-Burton Act, § 302. A Title III litigant is entitled, under section 302(1)(A) of the Helms-Burton Act, to recover monetary "damages" from a "trafficker" in an amount equal to whichever is greater, "...the fair market value of that property [i.e. the property in Cuba to which a litigant "owns the claim"], calculated as being either the current value of the property, or the value of the property when confiscated, plus interest." A further provision of the statute, section 302 (a)(3), allows for the essentially automatic trebling of the "money damages" available under Title III. The word "trafficking" is defined to include such things as to "control...manage, use or otherwise acquire or hold an interest" in "confiscated" properties in Cuba. *See id.* at § 4(13).

5. Title IV directs the Secretary of State to exclude from entry into the United States, "officers, principals or shareholders with a controlling interest of an entity which is trafficking in property [in Cuba], a claim to which is owned by a U.S. national." *See* Helms-Burton Act, § 401.

6. *Id.* at § 302(a) (1) (A). The Helms-Burton Act defines "confiscated" to mean, simply, "the nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property...without the property having been returned or adequate and effective compensation having been provided." *Id.* at § 4(4).

7. *See* Helms-Burton Act, § 4(15)(A).

8. Title II of the Helms-Burton Act sets out the details of the new Cuban nation that is intended to be created and overseen by the U.S. Congress. *See* Helms-Burton Act, §§ 201-07.

from this perspective, it is obvious that the Helms-Burton Act is really a foreign policy exercise thinly disguised as jurisprudence. Explicit corroboration that this is the case was provided on June 14, 1995, when Ignacio Sanchez, a Cuban American lawyer from Miami, appeared before a U.S. Senate subcommittee to argue that, "Inclusion of Cuban Americans [in Title III]...is imperative to accomplish the foreign policy goals [of the Helms-Burton Act]."[9] According to Mr. Sanchez, certified claimants (*i.e.* non-Cuban American potential plaintiffs under Title III) "represent *at most 5 percent* of the productive properties in Cuba."[10] He went on to say:

> Including the Cuban Americans provides a much greater coverage of property and therefore creates a more limited pool of potential investments in Cuba. By limiting foreign investment in Cuba, the bill detrimentally impacts upon the regime's chances to prolong its stay in power and *therefore the foreign policy objective is accomplished.*[11] (Emphasis added).

We have seen that the claims of Cuban Americans were considered integral to the achievement of the Helms-Burton Act's foreign policy objectives. The question that this Article will address is this: May the United States provide support, in the form of Titles III and IV of the Helms-Burton Act, to the claims of non-U.S. nationals (i.e. Cuban Americans) at the time of their foreign property losses?[12] The answer is an unequivocal "No."

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9. *Cuban Liberty and Democratic Solidarity Act: Hearing Before the Senate Subcomm. on Western Hemisphere and Peace Corps Affairs,* 104th Cong., 1st Sess. 128 (June 1995) (testimony of Ignacio Sanchez).

10. The term "certified claimants" refers to the 5,911 corporations and individuals that possess claims against Cuba certified by the Foreign Claims Settlement Commission in the late 1960s. *See* FOREIGN CLAIMS SETTLEMENT COMMISSION, FINAL REPORT ON THE CUBAN CLAIMS PROGRAM (1972). As will be described, in order to even file their claims the certified claimants were required to demonstrate that they held U.S. nationality *at the time their properties in Cuba were expropriated.*

11. *Id.*

12. Titles III and IV of the Helms-Burton Act are a form of state support for the claims of U.S. nationals vis-à-vis Cuba. Although such claims are usually espoused by the Executive Branch of the U.S. government (*i.e.* the Department of State) and, hence, are broadly described as being subject to "diplomatic protection," state support for the claims of a country's nationals may take a variety of forms. *See* FREDERICK S. DUNN, THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW 20

II. The Nationality of Claims Principle of Public International Law

A. *The Principle*

The "nationality of claims" principle of public international law is this: If international law is to apply to a governmental taking of property, anyone seeking state support for a claim of compensation for the taking must occupy– *at the time the property was actually taken*–the status of a non-national of the government that took the property.[13] By contrast, a governmental taking of property in the form of, for example, eminent domain proceedings, nationalizations, forfeitures, or any other expropriations ordinarily is a matter of purely domestic jurisdiction.[14] Again,

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(1932) ("In the present work we are concerned primarily with the practice or institution of protection itself, and not with any particular method by which the legal obligations thereunder may be enforced...the term "diplomatic protection" is here used as a generic term covering the general subject of protection of citizens and their property abroad, including those cases in which other than diplomatic means may be resorted to in the enforcement of obligations."). *See generally* EDWIN BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD: THE INTERNATIONAL LAW OF CLAIMS (1915), where frequent reference is made to States' "interpositions," vis-à-vis other States, on behalf of their citizens. Titles III and IV of the Helms-Burton Act constitute a statutory "interposition" of the United States in support of the international claims of certain of its citizens.

13. *See* OPPENHEIM'S INTERNATIONAL LAW 512 (Jennings, ed., 9th ed. 1992), where the distinguished British jurist, Professor Robert Jennings, puts the principle in these terms: "From the time of the occurrence of the injury until the making of the award the claim continuously and without interruption must have belonged to a person or to a series of persons having the nationality of the State by whom it is put forward." This means a State cannot support vis-à-vis another State any but the claims of its nationals who, of course, were aliens in relation to the expropriating state.

14. A narrow exception to the rule in a state's taking of the properties of its citizens may exist where the taking is an incident in the victimization of a person on racial or ethnic grounds. *See, e.g.*, Oppenheimer v. Cattermore, App. Cas. 249 (1976), where the House of Lords refused to recognize a Nazi law which had deprived a German Jew of both his property and nationality because of his race. As Lord Cross of Chelsea said, "A Judge should, of course, be very slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction . . . . But *what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds* all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all." *Id.* at 277-78. No claim has ever been made that properties were expropriated in Cuba on the grounds of race or ethnicity. Titles III and

for international law to apply to a governmental taking of property, the injured party quite simply *must* be a foreign national at the time of property loss.

II. The Basis of the Principle

In the *Case of Lithgow and Others*, the European Court of Human Rights, held that, "purely as a matter of general international law, the principles in question apply solely to *non-nationals*." [15]

The *Lithgow* case offers a partial explanation for the longstanding distinction made in international law between nationals and non-nationals (*i.e.* aliens) in cases involving governmental property takings:

> Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption. Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reasons for requiring nationals to bear a greater burden in the public interest than non-nationals.[16]

There are at least three other bases, apart from the reasoning of *Lithgow*, for the "nationality of claims" principle.

First, the protection of international law is afforded alien-owned properties in order to encourage transnational investment. In this regard it is instructive to note that Article 1101 of the North American Free Trade Agreement (NAFTA) accords a higher degree of protection to investments of signatory countries' nationals (Canadian, Mexican and U.S.) than is available to those nationals if their own governments should

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IV of the Helms-Burton Act are, of course, not limited to claims alleging violations of fundamental human rights, but rather applies to all Cuban governmental takings of property where "adequate and effective" compensation is not paid.

15. 102 Eur. Ct. H.R. (ser. A) (1986) at 113 (emphasis added). *Lithgow* involved a claim by British citizens that a U.K. statute which nationalized their property violated the European Convention for the Protection of Human Rights and Fundamental Freedoms.

16. *Id.* at § 116.

take their properties.[17] The reason for such protectiveness of alien-owned property is obvious–the encouragement of foreign private investment within the territories of NAFTA nations.

Second, the nationality of claims principle is underpinned by a general international rule of law in the area of state responsibility for injuries to aliens. The World Court articulated the basis of such support in 1924 in the *Mavrommatis Palestine Concessions Case:*

> "It is an elementary principle of international law that a state is entitled to protect its subjects when injured by acts contrary to international law committed by another state. By taking up the case of one of its subjects . . . a state is in reality asserting its own rights–its rights to ensure, in the person of its subjects, respect for the rules of international law."[18]
>
> A third reason for the rule that a nation may, under international law, support only the claims of those who are its nationals at *the time of property loss*, is the avoidance of offense to other nations that would arise from meddling (even with the best of intentions) in their domestic affairs. A striking example of the heightened sensitivities that exist in this respect was provided by U.S. Secretary of State Hamilton Fisk in 1874: "It would be a monstrous doctrine, which this government would not tolerate for a moment, that a citizen of the United States might deem himself injured by the authorities of the United States or any state, and could, by transferring his allegiance to another power, confer upon that power the right to inquire into the legality of the proceedings by which he may have been injured while a citizen."[19]

17. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M. 296 [hereinafter "NAFTA"].

18. 1924 PCIJ (ser. A) No. 2. Borchard approaches the matter from this point of view when he quotes Vattel to the following effect: "The interest of the state in protecting its citizens abroad is justified upon the theory formulated by Emerich deVattel: 'Whoever uses a citizen ill, indirectly offends the state, which is bound to protect its citizen; . . . ' The indirect injury which the state sustains by an injury to one of its citizens warrants bringing into operation the state's protective machinery." *See* BORCHARD, *supra* note 12, at 351.

19. Letter of April 8, 1874, *reprinted in* 6 JOHN MOORE, A DIGEST OF INTERNATIONAL LAW 637 (1906).

III. The Conclusiveness of the Nationality of Claims Principle

There is not the slightest question as to whether the nationality of claims principle is a rule of customary international law. The British jurist Professor Gillian White has written in her authoritative study, the *Nationalisation of Foreign Property*, that "... deprivation of rights of a proprietary nature is a prerequisite to any international claim arising out of a measure of nationalization or confiscation ... The other vital prerequisite is *that the owner of the nationalized property must have been an alien vis-à-vis the nationalizing State at the time of the measure* ...."[20]

The additional treatise authority which follows on this point has been selected chiefly for its contemporaneity, but it should be stressed that dozens of comparable references exist—all in full agreement as to the conclusiveness of the nationality of claims principle of public international law. For example, Ian Brownlie states that "... the relevant nationality must exist at the time of injury ...";[21] Malcolm Shaw notes that "... the nationality must exist at *the date of the injury* ...";[22] and Werner Levi writes, "... the person must be a national of the state before that state can claim damages .... There is little doubt that the person must have possessed the nationality of the state *when the injury occurred..*"[23]

IV. United States Practice With Respect to The Nationality of Claims Principle of Public International Law

A. *Congressional Branch Adherence to the Nationality of Claims Principle of Public International Law*

When Congress enacted the Cuban Claims Act in 1964, it gave specific authorization to the Foreign Claims Settlement Commission (FCSC)

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20. *See* GILLIAN WHITE, THE NATIONALISATION OF FOREIGN PROPERTY 50 (1962) (emphasis added).

21. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 482 (3rd ed. 1990).

22. *See* MALCOLM SHAW, INTERNATIONAL LAW 506 (3rd ed. 1991).

23. *See* WERNER LEVI, CONTEMPORARY INTERNATIONAL LAW 245-46 (1979).

to determine "the amount and validity of claims by nationals of the United States against the Government of Cuba . . . for losses resulting from the nationalization, expropriation, intervention, or other taking of . . . property . . . *owned . . . by nationals of the United States.*" [24] Section 504(a) of the Cuban Claims Act further states that "A claim shall not be considered under Section 503(a) of this title unless the property on which the claim was based was owned . . . by a national of the United States *on the date of loss . . .* "[25]

There was nothing unusual in the requirement that claimants availing themselves of the processes of the FCSC be U.S. nationals at the time of their property losses in Cuba. With respect to section 504(a), the legislative history of the Cuban Claims Act says merely that it "follows the pattern of previous U.S. claims programs [in providing] that a property claim shall not be considered unless the property involved was directly or indirectly owned by a U.S. national on the date of the loss . . . . "[26]

Congress has consistently followed the nationality of claims principle of international law when it has authorized claims programs on behalf of U.S. citizens against nations other than Cuba. Working under the auspices of the International Claims Settlement Act of 1949, the Foreign Claims Settlement Commission has conducted programs involving Yugoslavia, Panama, Poland, China, Ethiopia, Bulgaria, Hungary, Romania, Egypt, Ethiopia, Iran, Italy, Czechoslovakia, the Soviet Union, Vietnam, the German Democratic Republic and Cuba.[27] In not one of these programs has Congress required the Commission to violate international law

24. Cuban Claims Act, Pub. L. No. 88-666, 78 Stat. 1110 (1964), *codified at* 22 U.S.C. § 1643 *et seq.*, at § 503(a) (emphasis added).

25. *Id.* at § 504(a) (emphasis added).

26. S. REP. No. 88-1521, at 2 (1964). The Cuban Claims Act, was simply following international law—which is explicitly made controlling in the determination of claims under the International Claims Settlement Act of 1949: "In the decision of claims under the Title, the Commission shall apply . . . applicable principles of international law, justice and equity." 22 U.S.C. § 1623(a)(2). The Foreign Claims Commission in determining claims against Cuba was mindful of the statutory requirement that its decisions comport with international law. *See, e.g.*, In the Matter of Lisle Corporation, F.C.S.C. Dec. No. CU267 (1967) at 4 (" . . . . the Commission is expressly directed by Congress to apply 'the applicable principles of international law' . . . . ") (citing the International Claims Settlement Act of 1949).

27. *See generally* FOREIGN CLAIMS SETTLEMENT COMMISSION, ANNUAL REPORT TO CONGRESS 32-33 (1990) [hereinafter "F.C.S.C. REPORT"].

and consider the claims of non-U.S. nationals at time of property loss.

In most of the FCSC claims programs referred to above, non-U.S. nationals at time of property loss have, at some point, sought to be included in the programs and have petitioned Congress to that effect. Congress and the Executive Branch have been in consistent accord in rejecting the inclusion of claims of anyone other than U.S. nationals at time of loss. The State Department summarized, in terms which follow, the basis for the consistent refusal of both Congress and the Executive Branch to violate the international law of claims:

> Over the last several years bills have been introduced in the Congress to permit persons who were not citizens of the United States at the time of loss to receive compensation out of vested Bulgarian, Hungarian and Romanian assets for nationalizations in those countries. Bills have also been introduced to permit such persons to share in the proceeds obtained from lump-sum settlement agreements with the Governments of Bulgaria, Romania and Yugoslavia. Additionally, bills were introduced to permit such persons with nationalization claims against Czechoslovakia to share in the proceeds of the sale of a steel mill of the Czechoslovakian Government. Neither the executive branch nor the Congress favored any of such bills and none were enacted.
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> The Department is not aware of a single instance in which persons who were not citizens of the United States at the time of loss were permitted to share in any funds paid by foreign governments in settlement of claims for the nationalization or other taking of property. Payment of such claims would establish a new and novel precedent to the detriment of nationals of the United States having valid claims under principles of international law. The net result of this would be that one category of claimants would be paying the losses of another category. In the Department's view, such a result is highly undesirable.[28]

As will be described below, in only two instances–involving Czechoslovakia and Italy–have the claims of non-United States nationals at date of loss been said to have received favorable treatment by Congress.

The case of Italy was simply a matter of more money being available under a claims settlement agreement than there were qualified U.S.-

28. Letter to Senator Alan Cranston from Fabian A. Kwiatek (February, 1975), *reprinted in* 1975 DIGEST, at 484- 485.

national claimants to receive it—so the rule requiring U.S. nationality at time of loss was relaxed in the case of Italy solely in order to allow certain U.S. citizens to receive a share of *surplus* settlement funds. However, no claims were ever asserted by the United States *against Italy* on behalf of non-U.S. nationals at time of property loss, so there was no departure from either international claims law or the U.S. policy and practice in adhering to that law.

In the case of Czechoslovakia, Congress determined, after reviewing a complex set of circumstances, that a group of naturalized U.S. citizens (who had previously been Czech citizens) in fact held American nationality at the date of their losses and accordingly allowed them *ex gratia* payments from a settlement fund. Again, as was true of the Italian claims program, the favorable treatment extended by Congress to a small number of Czechoslovakian Americans constituted no departure from international claims law or practice.

The analysis of the Italian and Czechoslovakian programs which follows will highlight the differences between those programs and the impermissible State support given by the United States to Cuban Americans claims when Titles III and IV of the Helms-Burton Act were enacted.

(1) The Case of Italy

Pursuant to the Lombardo Agreement of 1947, Italy paid the United States $5 million to settle the war-related claims of U.S. nationals.[29] When the claims of U.S. nationals at date of loss were actually computed by the FCSC, the total amount certified, including interest, came to about $3.7 million. Because there was no reversion clause in the Lombardo Agreement, any excess money not distributed would have had to been deposited in the miscellaneous receipts account of the Treasury. In order to avoid this result, monies were distributed to several non-U.S. nationals (at date of their property losses in Italy) who were able to prove that they

29. *See* S. REP. 836-90, at 4-5 (1968). The Italian claims program was conducted on the basis that a lump sum agreement was negotiated between Italy and the United States for the wartime losses of U.S. citizens before the extent of those losses was more than very approximately known. The Foreign Claims Settlement Commission then determined the proved value of the claims of U.S. nationals against Italy, which turned out to be less than the amount negotiated between the U.S. and Italy. *Id.*

had become U.S. citizens through naturalization by 1955.[30]

Some years later, the Senate explained the basis for its decision to allow Italian Americans naturalized by 1955 to participate in the program:

> The Commission has adhered to the familiar rule of international law that, in order to be eligible to receive an award under the programs over which it has jurisdiction the claimant must show that his claim was owned by a national or nationals of the United States . . . from the time it arose until the date of filing with the Commission.
>
> It should be noted that this principle was consistently followed by the Committee on Foreign Relations in reporting legislation establishing the claims funds mentioned above. The only time the committee deviated from this principle was in 1958, when it approved an amendment relating to the Italian claims fund. The justification for making an exception in that case is explained in the following excerpts from the committee report (S. Rept. No. 1794, 85th Cong., 2d Sess.):
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> > The committee has added a new section to S.357 which has the effect of modifying Section 304 of the International Claims Settlement Act, as regards claimants against the Italian Claims Fund. As the committee has already noted, the existing practice in claims legislation, and one which the Committee endorses, limits claims to those based upon American ownership of a property at the time of loss and continuously thereafter until the time of the filing of the claim. This practice is essential if those who clearly have first claim, as far as the United States is concerned, to the limited funds available are to be compensated for their losses. Further, it should be noted in this connection that the claims of Americans who became citizens after their loss occurred usually are still valid against the responsible foreign government.
> >
> > However, a special situation has arisen as regards the Italian Claims Funds. In this instance, under the Lombardo Agreement the Italian Government made a lump-sum settlement with the United States Government for the outstanding claims of American citizens. It now appears that the Italian fund will be more than adequate to reimburse all claimants 100 cents on the dollar for losses of property which was American-owned at the time of loss and continuously thereafter.

30. *See* 22 U.S.C. § 1641c.

> At the same time, however, there are some Americans who were not citizens at the time of loss of their property, and, hence, in accordance with the general practice are not eligible to file valid claims against the Italian Claims Fund. But these citizens are also stopped from pressing their claims against Italy because of the terms of the Lombardo Agreement. They are, in short, left at the present time without legal remedy.
>
> In these circumstances, the committee has made provision for their claims to be considered as against the Italian Claims Fund, only, however, if after all valid claimants against Italy who were citizens at the time of loss have been fully reimbursed, some money remains in this fund. There is no cost involved in this procedure to the United States. Nor does the procedure do violence to the priority of right which as a matter of general practice should be maintained for those who were citizens at the time of loss.[31]

At no time was a claim made by the United States on Italy on behalf of non-U.S. nationals at time of property losses. The Italian claims program has, accordingly, no relevance to international law, or, for that matter, United States policy and practice with respect to that law. In distinct contrast, Title III of the Helms-Burton Act effectively reopens the Cuban claims program to allow non-U.S. nationals (*i.e.* Cuban nationals) at date of loss to assert directly, in U.S. federal courts, claims against the government of Cuba that have no basis in international law.

(2) The Case of Czechoslovakia

As indicated above, on only one other occasion–involving Czechoslovakia–has Congress been said to have allowed non-United States nationals at time of loss to receive compensation under a Foreign Claims Settlement Commission program. As will be explained below, (1) Congress specifically found in reopening the Czech program to a small group of naturalized Czechoslovakian Americans that this group *actually held U.S. nationality at time of their losses*; (2) the compensation paid this group was explicitly made *ex gratia;* (3) Congress expressly found that the circumstances pertaining to this small group of claimants were "extraordinary" and therefore, did "not establish any precedent for future

31. *See* S. REP. No. 836-90, *supra* note 29, at 5-6.

claims negotiations or payments;" and (4) Congress reaffirmed "the principle and practice of the United States to seek compensation from foreign governments on behalf *only* of persons who were nationals of the United States at the time they sustained losses."[32]

In grasping what Congress meant to do and actually did in the Czech claims program, it is important to understand from the outset that the expropriation of property in postwar Czechoslovakia involved two distinctly different episodes. In 1945, President Beñes nationalized various Czech-owned properties with public assurances of fair and just compensation.[33] On February 26, 1948 the Communist Party took power and repudiated the compensation promises of its the Beñes government.[34] In the meantime, a small number of Czechs had been naturalized in the United States between the date of the original expropriation of their properties in Czechoslovakia by the Beñes government and the date of the repudiation of the promise to compensate them by the Communist government. In reopening the Czech claims program in 1981 to allow for a measure of compensation to these claimants, Congress said:

> These claimants–the so-called "Beñes" claimants–were U.S. nationals by February 26, 1948, when the Communists took power in Czechoslovakia. Action, however, had been taken against some or all of their properties by the previous government of Edward Beñes, albeit with public promises by that government of fair and just compensation .... The committee believes ... that actions against property accompanied by promise of compensation should not, in this case, have been treated as takings, and that, *in fact, the properties of these claimants were taken by the Communist government when that government took power and repudiated the promises of compensation made by the government.*[35]

Ex gratia payments were accordingly authorized by Congress to be made to persons who met the following requirements: (1) their property was expropriated by the pre-February 1948 government of President

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32. *See* Czechoslovakian Claims Settlement Act, Pub. L. No. 97-127, 95 Stat. 1675 (1981), *codified at* 22 U.S.C. § 1642 *et seq.* (1982), at § 6(a)(2)(B) (emphasis added).

33. *See* Dayton v. Czechoslovak Socialist Republic, 834 F.2d 203, 204 (D.C. Cir. 1987).

34. *Id.*

35. H.R. REP. No. 97-385, at 9 (1981) (emphasis added).

Beñes on or after January 1, 1945 and before January 26, 1948; (2) they had become U.S. nationals by February 26, 1948; and (3) their previous claims were denied by the Foreign Claims Settlement Commission solely on the ground that "such property was not owned by a person who was a national of the United States on the date of such nationalization or taking."[36]

It should be emphasized that Congress did not intend that the *ex gratia* payments made to the Beñes claimants be seen to constitute a departure from established United States policy and practice in adhering to the nationality of claims principle of public international law:

> . . . the *ex gratia* payment hereinafter provided to certain claimants, who were otherwise excluded from sharing in this claims settlement under general-accepted principles of international law and United States practice, is justified only by the extraordinary circumstances of this case and does not establish any precedent for future claims negotiations or payments.[37]
>
> The Congress reaffirms the principle and practice of the United States to seek compensation from foreign governments on behalf only of persons who were nationals of the United States at the time they sustained losses by the nationalization or other taking of property by those foreign governments. In making payments under this section, the Congress does not establish any precedent for future claims payments.[38]

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36. *See* Czechoslovakian Claims Settlement Act, *supra* note 32, at § 6(b). The Beñes claimants ended up receiving approximately 12% of the principal value, as determined by the Foreign Claims Settlement Commission, of their lost properties. *See* Dayton, 834 F.2d at 204. By contrast, U.S. nationals at date of loss received 100% of the principal value of their properties, *i.e.*, $74.55 million in compensation against certified claims in the total principal amount of $72.61 million. *See* F.C.S.C. REPORT, *supra* note 27, at 33 nn. 3-4.

37. *See* Czechoslovakian Claims Settlement Act, *supra* note 32, at § 4(a). Congress in using the expression *ex gratia* could not have made the nature of its action with respect to the Beñes claimants much clearer. BLACK'S LAW DICTIONARY (6th ed. 1990) provides the following definition: "EX GRATIA: out of grace; as a matter of grace, favor, or indulgence; gratuitous. A term applied to anything accorded as a favor; as distinguished from that which may be demanded *ex debito*, as a matter of right."

38. *See* Czechoslovakian Claims Settlement Act, *supra* note 32, at § 6(a)(2)(B).

B. United States Executive Branch Adherence to the Nationality of Claims Principle of Public International Law

In reverse chronological order, several of the United States Department of State's pronouncements on the subject of the nationality of claims principle of international law will be reviewed:

> Under well-established principles of international law... the United States cannot espouse claims against foreign governments for injuries inflicted upon persons who were not U.S. citizens at the time of the injury.... [U]nder international law the date of taking is fixed by the date of the expropriation decrees and/or the date of physical seizure....[39]

In a February 6, 1975 letter to Senator Alan Cranston, an Assistant Legal Adviser for International Claims at the Department of State explained the U.S. government's policy of adherence to the principles of international law in the following terms:

> The Department is not aware of any legal or other valid reason why persons who were not American citizens when their properties were taken should share in the proceeds of lump-sum settlements with persons who were American citizens when their properties were taken.
>
> It is now and has always been the policy of the United States Government not to permit citizens of the United States who did not have that status at the time of loss to share in lump sums paid by foreign governments in settlement of claims for the nationalization or other taking of property. This policy rests upon the universally accepted principle of international law that a *state does not have the right* to ask another state to pay compensation to it for losses sustained by persons who were not its citizens at the time of loss.[40]

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39. Letter to Congress from Richard Fairbanks, Assistant Secretary of State for Congressional Relations (Oct. 2, 1981), *reprinted in* S. Rep. No. 97-211, at 4-5 (1981). The letter addressed the issue of proposed legislation pertaining to Czechoslovakia.

40. Kwiatek letter, *supra* note 28. There can be no doubt that the United States government considered its adherence to the nationality of claims principle compelled by international law. In a 1959 memorandum prepared by the Office of the Assistant Legal Adviser for International Claims setting out the views of the Department of State concerning the requisite nationality of claimants, the following treatise authority, among others, was offered in support of the principle that one must be an alien at the time one's property is taken by a foreign government for international law to apply; OPPENHEIM'S

In 1961, an Assistant Secretary of State wrote to Congressman Morris Udall to offer the following pronouncement:

> . . . It has been the long-standing practice of the Department to decline to espouse claims which were not owned by United States citizens at the time of loss or damage. This practice rests upon the universally accepted principle of international law that a state does not have the right to ask another state to pay compensation to it for losses or damages sustained by persons who were not its citizens at the time of loss or damage.[41]

In a 1959 memorandum of international law pertaining to the issue of nationality of claims, the Department of State said:

> There is no doubt that generally accepted principles of international law and practice require that a claim be continuously owned from the date the claim arose, and at least to the date of presentation, by nationals of the state asserting the claim.[42]

Two further United States' Executive Branch pronouncements on the subject will suffice:

> . . . the rule that this Government cannot undertake to prosecute claims for indemnity against foreign governments unless the claimants are

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INTERNATIONAL LAW (Lauterpacht, ed., 6th ed.) 314 (". . . it may be stated as a general principle that from the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or to a series of persons who (a) have the nationality of the state by whom it is put forward, and (b) do not have the nationality of the state against whom it is put forward."); CHARLES HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 893 (1945) ("A state should not undertake to press a claim for redress in behalf of an individual against a foreign government, unless he was one of its own nationals both at the time when the claim arose, and continuously thereafter."); MARJORIE WHITEMAN, DAMAGES IN INTERNATIONAL LAW 96 (1937) ("A claim having its origin in an injury to an individual must be national in origin, i.e., the injury must have been committed against one who was a national of the claimant state at the date of the injury."); A.H. FELLER, THE MEXICAN CLAIMS COMMISSION 44-45 (1935) ("We have seen that under general principles it is essential that the claim should have been a national one at its inception."). *See A Bill to Amend the International Claims Settlement Act of 1949, As Amended: Hearing Before the Senate Subcomm. on International Claims Legislation*, 86th Cong., 1st Sess. 58, 59-60 (1959) [hereinafter "ICSA Hearing"] where the above-referenced State Department memorandum is reprinted in its entirety.

41. MS., Dep't of State, file 262.1141 Breger, Marcus/12-861, *reprinted in* 8 Whiteman DIGEST 1233.

42. ICSA Hearing, *supra* note 40, at 67.

> citizens of the United States would be applicable to the present case, since the claimants, not being citizens of the United States, doubtless were, at the time of the injuries complained of, subjects of Spain or of some other government.... The acquisition of title to a government's protection does not operate retroactively.[43]

And, finally:

> I feel constrained to say that the view you thus advocate can not be admitted by this Department, it being conceded that the injury which the claimant sets up was sustained and consummated during the period when he was a German subject, and before he became a citizen of the United States.[44]

Two relatively recent corroborations of Executive Branch adherence to the nationality of claims principle of public international law are provided by the examples of the *Algiers Accords* of 1981 and the investment protection provisions of the North American Free Trade Agreement (NAFTA).

The *Algiers Accords* memorialized an agreement between the United States and Iran that a tribunal would be created at the Hague "for the purpose of deciding the claims of nationals of the United States against Iran and claims of nationals of Iran against the United States...."[45] Article VII of the Agreement defined "claims of nationals" to mean only those claims, *"owned continuously from the date on which the claim arose.... by nationals of that state..."*[46]

NAFTA contains specific investment protection provisions in the event of expropriations of the "investment of an investor of another party

43. 230 MS. Dom. Let. 378 (1898), *reprinted in* MOORE, *supra* note 18, at 633, where an Assistant Secretary of State explains that the United States would not espouse the claims of Cubans for property destroyed by the Spanish government in Cuba. It is of course an impermissible retroactivity of U.S. protection that is conferred upon Cuban Americans by Title III of the Helms-Burton Act.

44. Acting Assistant Secretary of State Porter writing in 1887, *reprinted in* MOORE, *supra* note 18, at 633.

45. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims By the United States of America and the Government of the Islamic Republic of Iran, 20 I.L.M. 224, 230 (1981).

46. *Id.* at 233.

in its territory."[47] "Investor of another party" is defined as "a national . . . of such party."[48]

C. *United States Judicial Branch Adherence to the Nationality of Claims Principle of Public International Law*

In *De Sanchez v. Banco Central de Nicaragua*, a U.S. federal appeals court stated,

> . . . there is a basic reason why Nicaragua's actions are not subject to review . . . it affected only a Nicaraguan national, Mrs. Sanchez. With a few limited exceptions, international law delineates minimum standards for the protection only of aliens; it does not purport to interfere with the relations between a nation and its own citizens. Thus, even if Banco Central's actions might have violated international law had they been taken with respect to an alien's property, the fact that they were taken with respect to the . . . property rights of a Nicaraguan national means that they were outside the ambit of international law.[49]

Even in cases where plaintiffs have demonstrated a genuine hardship arising from their government's taking of their property the courts nonetheless have recognized the duty to uphold the integrity of international law against the temptation to provide *ad hoc* remedies without legal basis. *Bank Tejarat v. Varsho-Saz,* was such a case. An Iranian citizen claimed that his property had been "wrongfully and fraudulently confiscated by the Iranian government." The court held,

> While such an act may offend our notions of justice, *see* U.S. Const. Amend. V ("nor shall private property be taken for public use, without just compensation"), the taking by a government of the property of one of [its] citizens, located within its territory, does not constitute a violation of international law. [50]

Finally, a federal court in *F. Palacio y Compania, S.A. v. Brush,* held, in a case involving Cuban former owners of cigar manufacturing enterprises in Cuba, that ". . . confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether

47. *See* NAFTA, *supra* note 16, at art. 1101 *et seq.*
48. *Id.* at art. 1139.
49. *See* 770 F.2d 1385, 1395 (5th Cir. 1985).
50. *See* 723 F. Supp. 516 (C.D.Cal. 1989).

compensation has been provided, do not constitute violations of international law."[51]

V. The United States is "Estopped" from Supporting the Claims of Non-U.S. Nationals at Time of Property Losses in Cuba

The estoppel principle in international law may be stated as follows: A State which has by declaration and conduct maintained a position which is manifestly contrary to the right it then claims with respect to another State is *precluded* from claiming that right.[52]

The International Court of Justice has stated that the "...primary foundation of this principle is the good faith that must prevail in international relations, in as much as inconsistency of conduct or opinion on the part of a state to the prejudice of another is incompatible with good faith."[53]

As we have seen, the executive, legislative and judicial branches of the U.S. government have, until last year when the Helms-Burton Act became law, been undeviating in their adherence to the nationality of claims principle of international law. It follows inescapably that the inclusion of Cuban American claims in Titles III and IV of the Helms-Burton Act constitutes nothing less than an act of bad faith on the part of the United States in its relations with other nations and it is, as a matter of international law, estopped from lending support to such claims.

Estoppel also pertains to any assertion that U.S. support for Cuban American claims against Cuba is justified under the international law of human rights. On June 11, 1997 an op-ed piece by Edwin D. Williamson, a former legal advisor at the State Department under President Bush, appeared in the Washington Times.[54] In his piece Mr. Williamson makes

51. *See* 256 F. Supp. 481 at 487 (S.D.N.Y. 1966), *aff'd* 375 F.2d 1011 (2d Cir. 1967). *See also* Chudian v. Philippine National Bank, 912 F. 2d 1095, 1105 (9th Cir. 1990); Dreyfus v. Von Finck, 534 F. 2d 24, 30-31 (2d Cir. 1974).

52. Case Concerning the Temple of Preah Vihear, (Cambodia v. Thail.) 1962 ICJ Reports 40. The operative principle is described variously as *preclusion* in French, *estoppel* in English and the *doctrina de los actos proprios* in Spanish.

53. *Id.* at 42.

54. Edwin D. Williamson, *Protecting Everyone's Right to Property*, WASH. TIMES, June 11, 1997, at A21.

several statements concerning something he calls "property rights." He begins by describing these rights as "internationally recognized." However, it turns out that these "rights" are not, in fact, very widely recognized at all, because Mr. Williamson says later in his article that a treaty between the United States and the European Union is necessary to "*establish*... international legal rules recognizing and protecting property rights."[55] In truth, a treaty between the United States and the European Union will not codify international "rules" concerning property "rights–it will invent a set of such rules. Mr. Williamson confirms that this is the case elsewhere in his piece when he says that a treaty is "sorely needed because the international recognition of property rights lags behind the recognition of other rights."[56]

The American Law Institute thoroughly considered the question of property as a human right when it revised the Restatement (Third) of the Foreign Relations Law of the United States in 1984.[57]

In the end the Restatement settled, at Section 702, on the following rights under the heading "Customary International Law of Human Rights," declaring that:

A state violates international law if, as a matter of state policy, it prac-

55. *Id.* (emphasis added). The impetus for the treaty negotiations between the U.S. and the European Union ("E.U.") over the issue of property "rights" was the European Union's filing in October 1996 of a complaint at the World Trade Organization ("WTO"). The European Union's complaint arose from the passage by the United States of the Helms-Burton Act in March, 1996. On April 11, 1997 the E.U. agreed to suspend its WTO complaint and to negotiate with the U.S. "disciplines" to "inhibit and deter" investments in properties "expropriated or nationalized...in contravention of international law." *See* European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act (Apr. 11, 1997), 36 I.L.M. 529 (1997). Once such disciplines are in place and the European Union is seen to be adhering to them, Congress is expected to give the president the authority to waive Title IV exclusions with respect to European nationals. In fact, if the European Union does prohibit investment in certain properties in Cuba by European nationals, there will really be no further need for Title IV with respect to such Europeans, so Europe will gain nothing from the "waiver" of Title IV.

56. Williamson, *supra* note 54, at A21.

57. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). It should be remembered that the Restatement is not meant to be merely an expression of United States' opinion or position on a particular issue of international law. The Restatement, by its own terms, "represents the opinion of the American Law Institute as to *the rules that an impartial tribunal would apply* if charged with deciding a controversy in accordance with international law." (Emphasis added). *Id.* at 3.

tices, encourages or condones
(a) genocide,
(b) slavery or slave trade
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized human rights.

Plainly absent from Section 702's list of human rights violations are deprivations of property. In 1982 at the Annual Meeting of the American Law Institute, Monroe Leigh made a motion to include property rights within Section 702's list of human rights that are protected by customary international law. The following response was made by Professor Louis Henkin:

> [S]tates have not accepted as a matter of customary law as regards their own nationals the same right of property that they are prepared to include in covenants and that they are prepared to apply to foreign nationals. That is the key distinction. States are prepared, we believe, to accept the right of property for foreign nationals. They have not been prepared to accept it as a matter of customary law for their own nationals...The notion that we can declare to be customary that which the world has not accepted as customary law seems to be going pretty far. It would be a serious mistake for us to adopt this motion.[58]

Immediately after Professor Henkin finished speaking, Mr. Leigh's motion was resoundingly defeated.[59]

Conclusion

In order to achieve a foreign policy objective with respect to Cuba, Congress violated the nationality of claims principle of public international law. As a matter of urgency, the Helms-Burton Act must be amended to remedy that violation. If the United States persists in a continuing breach of international law it will undermine the global rule of

58. 58 A.L.I. Proc. 216-217, 221 (1982).
59. *Id.*

law to the detriment of the citizens of this country. How, after all, can the United States demand compliance with international law by other nations when it is in violation of that very system of law? The short and obvious answer is that it cannot.